

No. 10-1985

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2010

BENTON KEATLEY

PETITIONER,

v.

ANDREW FINNICUM, ET. AL.,

RESPONDENTS.

On Writ of Certiorari to the United States Supreme Court

BRIEF FOR THE PETITIONER

September 18, 2010

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Counsel for Petitioner

QUESTIONS PRESENTED

Whether *Hustler v. Falwell*'s higher level of proof (actual malice) can apply to an Intentional Infliction of Emotional Distress action brought by a private plaintiff?

Whether a state can use the tort of Intrusion Upon Seclusion to protect its private citizens from offensive speech, even if that speech is loose or hyperbolic?

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STATEMENT OF THE CASE

On March 10, 2006, the Respondents, members of the Sydney Lewis Church of God, picketed the funeral of Lance Corporal Andrew Keatley, a marine killed in the line of duty. Although the Respondents picketed across the street from the funeral and complied with all police direction, their handmade signs and salacious chants were heard and seen by those attending the funeral, including Andrew's father, Petitioner Benton Keatley. Local media covered the protest and a special report aired on the news that evening. In the weeks following the demonstration, Mr. Keatley fell violently ill and became emotionally unstable. To this day, Mr. Keatley has yet to fully recover, with both his physician and psychiatrist confirming that the protests significantly contributed to Mr. Keatley's unstable condition.

Respondent Andrew Finnicum is the founding member and leader of the Sydney Lewis Church of God in Leetown, West Virginia. Approximately 70 of the 100 members are his relatives, including Respondents Victoria Finnicum-Corder and Rebecca Finnicum-Clinton. The orthodoxy of the church rests upon the notion that God despises homosexuality and punishes America for its acceptance, especially in the United States military. Upon learning of Lance Cpl. Keatley's funeral by reading his obituary in the local newspaper, the Respondents issued a news release, announcing that the Finnicum family intended to picket the funeral.

The funeral took place at St. Rodney's Catholic Church in Lexington, South Virginia where Lance Cpl. Keatley had attended mass as a child. Respondents, protesting the funeral as a means to garner attention to their religious views, carried signs that read "Gay Troops Cause War," "God Condemns Homosexuals," and "America Will Perish." They also created signs directed toward the funeral procession such as "God Killed You," "Marine Corps Gays Should

Die,” “Burn in Hell Andrew,” and “Andrew Drove a Gay Car.” Mr. Keatley and others attending Andrew’s funeral saw the signs and could not avoid the Respondents’ chants of “God Hates Fags” upon entering and leaving St. Rodney’s Church for the funeral.

Mr. Keatley filed two actions against Andrew Finnicum, the Sydney Lewis Church of God, Victoria Finnicum-Corder, and Rebecca Finnicum-Clinton, under two South Virginia state tort law claims; intrusion upon seclusion and intentional infliction of emotional distress (hereinafter referred to as “IIED”). Mr. Keatley brought the suit in the South Virginia District Court and Finnicum removed the case to federal court for the District of South Virginia.

The District Court held that the standard established in *Hustler Magazine, Inc. v. Falwell*, that public figures may not recover for IIED without showing that the offending publication contained a false statement of fact that was made with “actual malice,” did not apply to the Mr. Keatley’s case. *Keatley v. Finnicum*, 300 F.Supp. 3d 1, 4 (D.S.Va. 2008) (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)). The court held that the record contained ample evidence that Mr. Keatley is a private figure. *Keatley*, 300 F.Supp. at 4. In reviewing the Respondents’ action, the District Court held that “. . . intentionally harmful personal attacks on a private person should not gain absolute First Amendment protection merely because they are hurled in conjunction with speech concerning matters that are arguably of public concern.” *Id.*

Relying on *Hill v. Colorado*, the District Court further noted that the Respondents’ right to address a willing audience can be limited when addressed at an unwilling, but “captive” audience. *Id.* at 5. The court found that the attendees of Lance Cpl. Keatley’s funeral constituted such a “captive audience.” *Id.* Acknowledging that the mourners could not “simply turn their heads to avoid protests without sacrificing their right to partake in the funeral service,” the

District Court held that the First Amendment protection did not extend to the Respondents' protests as directed at the unwilling and captive funeral attendees. *Id.*

The Circuit Court overturned the District Court decision. *Keatley v. Finnicum*, 200 F.3d 1 (12th Cir. 2009). The Circuit Court held that: (1) District Court erred when it utilized incorrect legal standard in its post-trial opinion; and (2) the sign were protected under the First Amendment. *Id.*

This Court granted Mr. Keatley's petition for a writ of certiorari.

SUMMARY OF THE ARGUMENT

Mr. Keatley respectfully submits to this Honorable Court the following arguments for consideration: (1) *Hustler v. Falwell*'s actual malice standard does not apply to an IIED action brought by a private plaintiff; and (2) a state can use the tort of intrusion upon seclusion to protect its private citizens from offensive speech, even if that speech is loose or hyperbolic.

First, Mr. Keatley is not required to show actual malice because the standard applies only to public figures. Requiring public figures to prove a defendant acted with actual malice stems from the particular status public figures carry as well as the consequences of that status. As the District Court held explicitly, and the Circuit Court implicitly, Mr. Keatley is a private figure. As a private figure, Mr. Keatley does not have a comparable means of accessing the media because he never availed himself of the public arena. Consequently, the actual malice standard should not apply. Moreover, the definition of "actual malice" precludes its application because the standard implies statements must be falsifiable. Because Respondents' statements are opinions, that standard cannot apply. Further, the content of Respondents' signs and chants are

arguably unrelated to matters of public concern. Mr. Keatley respectfully submits that Respondents' statements are not matters of public concern because, taking into consideration the context of the statements, a funeral is a matter of private concern. Finally, should the Respondents' statement be found to relate to matters of public concern, Mr. Keatley need only prove some level of fault as required by *Gertz v. Robert Welch, Inc.*. Given that South Virginia has provided such a level of fault in the statutory definition of IIED that does not include actual malice, Mr. Keatley need only prove the Respondents acted intentionally or recklessly to recover actual damages.

Second, a state can use the tort of intrusion upon seclusion to protect its private citizens from offensive speech, even if that speech is loose or hyperbolic. In light of the reasonable expectation of privacy possessed by family members of the deceased during a funeral, states have a substantial interest in protecting the privacy of those in mourning. In order to promote this and other substantial privacy interests, the state of Virginia codified the common law tort of intrusion upon seclusion. This statute protects private citizens from those who would intrude upon their private affairs in a highly offensive manner. Respondents in the present case claim they are shielded from liability by the First Amendment's protection of loose, figurative, or hyperbolic speech, as defined by this Court. However, this Court in *Frisby v. Schultz* noted that all protected speech is subject to limitation in the case of a captive audience. Despite the Court of Appeals' contention, this exception has been upheld in a variety of cases, no matter the type of speech. Because Lance Cpl. Keatley's funeral attendees were such a captive audience, Respondents' language is not entitled to First Amendment protection.

Even if the captive audience did not apply, the loose, figurative, and hyperbolic speech protection has traditionally been applied to cases of defamation or intentional infliction of

emotional distress arising from defamation. This protection should stay limited to the aforementioned torts and do not apply in situations like the present where highly intrusive speech is directed at private citizens in a private setting. Finally, this law passes the *Ward* test on statutes with the potential to limit free speech, and thus must be upheld in the face of Respondents' constitutional challenge. The statute is content-neutral, it is a restriction on time, place, and manner of speech, it is narrowly tailored to serve an important governmental function, and it leaves ample alternative avenues for communication.

ARGUMENT

I. *HUSTLER V. FALWELL*'S ACTUAL MALICE STANDARD DOES NOT APPLY TO AN IIED ACTION BROUGHT BY A PRIVATE PLAINTIFF.

This Court established in *New York Times Co. v Sullivan* that the First Amendment's guarantees of freedom of speech and press prohibits public official from recovering damages for defamatory falsehood relating to his official conduct unless he proves that statement was made with "actual malice." *New York Times Co. v Sullivan*, 376 US 254, 270–281(1964). Actual malice is defined as "knowledge that [the statement made] was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 280. In *Hustler v. Falwell*, this Court further held that a showing of actual malice is required before public officials could recover for the tort of IIED. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). *Hustler*, however, stopped short of requiring actual malice be proven in cases involving private plaintiffs. *Id.*

A. Mr. Keatley is Not Required to Show Actual Malice Because the Standard Applies Only to Public Officials or Public Figures.

Respondent contends that Lance Cpl. Keatley and his father, Mr. Keatley, became public figures when Mr. Keatley filed a notice of the funeral in the obituary section of the local newspaper. *Keatley v. Finnicum*, 300 F.Supp. 3d 1, 3 (D.S.Va. 2008). The District Court rejected this argument due in part to the test articulated under *Gertz v. Robert Welch, Inc.*, where an individual is considered a public figure when he has “thrust [himself] to the forefront of particular public controversies in order to influence the resolution of the issues involved.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Moreover, the Circuit Court noted the significance of *Gertz* in protecting private individuals by not extending the actual malice requirement to “speech targeting private figures.” *Keatley v. Finnicum*, 200 F.3d 1, 2 (12th Cir. 2009).

As the District Court conclusively held, Mr. Keatley is and has remained a private figure because he neither invited attention nor comment when he filed the obituary in the newspaper. *Keatley*, 300 F.Supp. at 3. The District Court cited two main reasons to afford private figures this level of protection. First, public figures have a notable advantage in responding to speech targeted at them. *Id.* at 2. Public figures, by virtue of their status in the public arena, are able to access the mass media, both to “influence policy and to counter criticism of their views and activities.” *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 164 (1967). In contrast, Mr. Keatley’s status as a private individual precludes the possibility of having ready access to media outlets to counter Respondents’ statements. Second, unlike private individuals, public figures voluntarily expose themselves to criticism given their ability to “shape events in areas of public concern to society at large.” *Hustler*, 485 U.S. at 51 (*quoting Associated Press v. Walker, decided with Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result)). The degree of influence possessed by public officials necessitates protecting speech deemed to be

critical, given the fundamental importance of unimpeded debate on matters of public interest and concern. *Id.* at 50–51. Consequently, the high level of proof required by the actual malice standard does not apply to Mr. Keatley’s IIED claim. As a private individual, Mr. Keatley is not in an position to effectively counter Respondents’ offensive speech. More importantly, Mr. Keatley is not a willing participant in the public arena and never sought to influence matters of public import—in providing notice of the funeral, Mr. Keatley wanted only to honor the memory of his son with those close to the family.

B. Mr. Keatley is Not Required to Show Actual Malice Because the Standard is Limited to Falsifiable Statements

Where public official or public figure plaintiffs are involved, the *New York Times* rule requires a showing of falsity before liability can result. *New York Times*, 376 U.S. at 279–280. This requirement is derived from definition of actual malice articulated by this Court in *New York Times* and referred to again in *Hustler*—knowledge that statements made were false or with reckless disregard for the truth. *New York Times*, 376 US at 280 (1964); *Hustler*, 485 U.S. at 56. This Court noted in *Hustler*, “[f]alse statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual’s reputation that cannot easily be repaired by counterspeech, however persuasive or effective.” *Hustler*, 485 U.S. at 52. In this case the Circuit Court held that the signs carried by Respondents do not “assert provable facts about an individual . . . they clearly contain imaginative and hyperbolic rhetoric.” *Keatley*, 200 F.3d at 4–5. Lacking disputable facts, Respondents’ signs and chants are properly characterized as opinions. Along the same lines, in *Hustler*, the jury found that an ad parody could not reasonably be understood as describing actual facts or events in which the plaintiff participated. *Hustler*, 485 U.S. at 57. In that case, this Court

effectively held that the plaintiff could not recover on the basis of IIED when the offending speech was an ad parody. *Id.* Consequently, Mr. Keatley is not required to prove that Respondents acted with actual malice because the standard is one that cannot be applied—Respondents’ statements of opinion are not falsifiable.

C. Mr. Keatley is Not Required to Show Actual Malice Because the Statements of Opinion Did Not Involve Matters of Public Concern.

Mr. Keatley requests this Court to examine whether Respondents’ chants and handmade signs subsequently broadcasted on local television constitutes an occasion of “public concern” under *Hustler*. *Hustler*, 485 U.S. at 46. The Circuit Court in this case held Respondents’ protest related to “debated matters of public concern.” *Keatley*, 200 F.3d at 3. To support its position, the Circuit Court relied on *Acanfora v. Bd. of Educ. of Montgomery County*, 491 F.2d 498 (4th Cir.1974); however, it is important to distinguish between the context and content of statements made in the public interest. We ask this Court to reconsider the factors previously articulated under *Dun & Bradstreet, Inc. v. Greenmoss Builders* providing that matters of public concern “must be determined by the content, form, and context of a given statement, as revealed by the whole record.” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985).

In *Acanfora*, the Court of Appeals considered speech concerning homosexuality *in conjunction* with Acanfora’s personal situation to constitute a matter of public concern. *Acanfora*, 491 F.2d at 500–501 (“[T]he record discloses that . . . commentators considered homosexuality in general, and Acanfora’s plight in particular, to be a matter of public interest.”). The context of the speech in that case centered on television, radio, and press interviews Acanfora gave regarding the difficulties homosexuals, such as himself, encounter in modern

society. *Id.* at 500. Such speech comports with matters of public concern insofar as the interviews furthered the “interchange of ideas for the bringing about of political and social changes desired by the people.” *New York Times*, 376 U.S. at 269. The context of speech that gave rise to a public concern in *Acanfora* stands in stark contrast to the context in the present case. Respondents are seeking to make a private funeral into an *ex-post facto* public event. By merely showing up to Lance Cpl. Keatley’s funeral, they argue the funeral becomes a matter of public concern. But if Respondents’ position is one which the court adopts, then any private event—no matter intimate—could be transformed into a public spectacle merely because protestors are present. As the District Court noted, Respondents “cannot by their own actions transform a private funeral into a public event.” *Keatley*, 300 F.Supp. 3d at 4. Mr. Keatley requests the Court to find that the event itself, before the protestors arrive, must be one where the public interest lies.

D. If Respondent’s Statements of Opinion Did Involve a Matter of Public Concern, Mr. Keatley Need Only Show That the Statements Were Made With Some Level of Fault as Required by *Gertz*.

Even if Respondents’ statements relate to a matter of public concern, Mr. Keatley need not prove a level of fault that rises to actual malice. This criterion is well-articulated in *Milkovich v. Lorain Journal Co.*; “where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault as required by *Gertz*.” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (U.S. 1990). In *Gertz*, this Court held that states may define the appropriate standard of liability, so long as they do not impose liability without fault. *Gertz*, 418 U.S. at 347. Although this directive gave broad discretion to the states on the issue of liability, this Court provide that the state standard must be

lower than actual malice to recover actual damages. *Id.* South Virginia has provided such a standard, embodied in S.Va. Code § 12.4, requiring a plaintiff to show a defendant acted “intentionally or recklessly” in an action for IIED. Consequently, Mr. Keatley need only prove the Respondent’s action fell within the necessary elements of IIED to recover.

II. THE STATE CAN USE THE TORT OF INTRUSION UPON SECLUSION TO PROTECT ITS PRIVATE CITIZENS FROM OFFENSIVE SPEECH, EVEN WHEN THAT SPEECH IS LOOSE OR HYPERBOLIC.

In light of the “reasonable expectation of privacy possessed by family members of the deceased” during a funeral, states have a substantial interest in protecting the privacy of those in mourning. *National Archives v. Favish*, 541 U.S. 157, 172 (2004). In order to promote this and other substantial privacy interests, the state of Virginia codified the common law tort of intrusion upon seclusion. S.Va. Code §12.8. This statute protects private citizens from those who would intrude upon their private affairs in a highly offensive manner. This runs contrary to the First Amendment’s traditional protection of contentious speech. *Milkovich*, 497 U.S. at 1.

However, this Court in *Frisby v. Schultz* noted that all protected speech is subject to limitation in the case of a “captive audience.” *Frisby v. Schultz*, 487 U.S. 474, 484–485 (1988). This exception has been upheld in a variety of cases, regardless of the type of speech. *See Hill v. Colorado*, 530 U.S. 703 (2000) (protests outside of a medical clinic that performs abortions); *Phelps-Roper v. Strickland*, 539 F. 3d 356 (6th Cir. 2008) (anti-homosexual protestors at a soldier’s funeral).

Additionally, S. Va. Code §12.4 passes the *Ward* test on statutes with the potential to limit free speech, and thus must be upheld in the face of Respondents’ constitutional challenge. The statute is content-neutral, it is a restriction on time, place, and manner if speech, it is

narrowly tailored to serve an important governmental function, and it leaves ample alternative avenues for communication. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Finally, the loose and hyperbolic speech protection has traditionally been applied to cases of defamation or intentional infliction of emotional distress arising from defamation, not harassment of private citizens at private events. *See Hustler*, 485 U.S. at 46 (noting that public figures cannot recover for intentional infliction of emotional distress arising out of a defamatory article).

A. Outrageous and Hyperbolic Speech is Not Protected When Directed at Private Citizens Protected Under the “Captive Audience” Exception.

In *Frisby*, this Court noted that a “state’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.” *Frisby*, 487 U.S. at 484. The traditional expectation that the unwilling listener turn their head is not present, thus the First Amendment permits prohibition of “offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech.” *Id.* at 487. Mr. Keatley is a similarly “captive audience.” Short of avoiding his son’s funeral entirely, it would have been impossible to avoid Respondents’ signs and their chanting of “God Hates Fags.”

Further, in *Hill v. Colorado*, this Court expanded the idea of the captive audience to medical care facilities. This Court noted the significant state interest in proper medical care for their citizens and added that patients entering medical facilities are often in a “particularly vulnerable physical and emotional” condition. *Hill v. Colorado*, 530 U.S. 703, 729 (2000). Similarly, funeral-goers fall into an emotionally vulnerable class not unlike the medical facility patients. *Hill* thus stands for the proposition that a captive audience, particularly one with vulnerable members, may still limit free speech in public places.

The funeral in the present case falls into that category. Courts throughout the United States, including this Court, have noted the interest that states and individuals have in preserving the sanctity of funeral rites. In *Favish*, this Court deemed it appropriate to allow family members to assert privacy rights against public intrusions “long deemed impermissible under the common law and cultural traditions.” *Favish*, 541 U.S. at 158. Given the sanctity of funeral rites, shouting offensive comments at the deceased is a public intrusion deemed impermissible under cultural traditions. This Court further acknowledged that family members have a personal stake in objecting to “unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased.” *Id.* at 168. The aforementioned case dealt with the Freedom of Information Act, but it clearly indicates the significant state interest in protecting this class of captive audience. Further, this interest outweighs Respondents’ interest in protesting *in such a way* that they impermissibly interfere with Mr. Keatley’s right to mourn his son.

B. Under the “Captive Audience” Provision, South Virginia’s Statute Does Not Impermissibly Interfere with Free Speech Pursuant to *Ward v. Rock Against Racism*.

This Court in *Ward*, enunciated certain factors when deciding the constitutionality of a law limiting free speech. *Ward*, 491 U.S. at 781. To be upheld, the statute must impose content-neutral time, place, and manner restrictions, which must be narrowly tailored to serve a significant government interest, and must leave open ample alternative channels of communication. *Hill*, 530 U.S. at 710. In this case, S. Va. Code §12.4 does not limit any of the above functions.

In *Clark v. Community for Creative Non-Violence*, this Court explained that in determining content neutrality, the question is whether the government has “adopted the regulation because of disagreement with message it conveys.” *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984). This applies in the current case, because S. Va. Code §12.4 does not discriminate based on the message conveyed. If the *manner* of conveyance is highly offensive to a reasonable person, liability attaches. This is true regardless of the message conveyed. Further, a regulation is content-neutral if the legislative purpose is neutral even if there is an incidental effect on some speakers but not others. *Renton v. Playtime Theaters, Inc.*, 472 U.S. 41, 47-48 (1986).

S. Va. Code §12.4 does not put affirmative limits on the time, place, or manner of speech aside from the requirement that speakers do not interfere with other’s private lives in a way that is highly offensive. This minimal restriction easily allows for ample alternative channels of communication. For example, Respondents could protest in any other place; in the same place at any other time; or in the same place at the same time in a manner not highly offensive to the reasonable person. This would hardly interfere with the “breathing space” for contentious speech required by the First Amendment.

In fact, Respondents could continue to act in the exact same way, if they so chose. This statute merely provides a private right of action when the time, place, and manner of speech would be “highly offensive” to a reasonable person. As noted previously, the captive audience analysis amply demonstrates that shouting obscenities at private citizens entering a private funeral is so intrusive that it not only falls under S. VA Code §12.4, but falls out from under the protection of the First Amendment.

C. “Loose, Hyperbolic Language” Protection Under the First Amendment Should Apply Only to defamation Suits, Not to Intrusion Upon Seclusion of a Private Event, Such as Lance Corporal Keatley’s Funeral.

In *Milkovich* this Court specified two categories of speech protected under the First Amendment: statements of opinion and “loose, figurative, and hyperbolic” speech. *Milkovich*, 497 U.S. at 19–21. This second category is protected, because hyperbolic language negates a reader’s impression that the writer was stating a falsifiable fact rather than an opinion. *Id.* at 21. It is only then reasonable to protect hyperbolic speech in the context of defamation, or IIED, arising from defamatory statements. As this Court declared in *Hustler*, protection of hyperbolic speech protects a basic right of American citizenship, which is “the right to criticize public men,” even though such criticism “will not always be reasoned or moderate.” *Hustler*, 485 U.S. at 51. These cases uphold the First Amendment’s intent to protect free debate about public people in public affairs.

The need to protect discourse about public figures, however, falls away when the hyperbolic speech extends to a private citizen and a private affair. This Court has previously refused to extend defamation protection when applied to private citizens. *See Gertz*, 418 U.S. at 323. This refusal, combined with the captive audience exception, shows that hyperbolic speech is not protected when directed at a private citizen at a private event.

Virginia’s intrusion upon seclusion statute aims to protect these individuals and circumstances. S. Va. Code §12.4 (intentional intrusion...upon the solitude or seclusion of another or his private affairs... is subject to liability if the intrusion would be highly offensive to a reasonable person). Further, this is the situation now before the Court. Lance Cpl. Keatley’s funeral was a private affair mourning the death of a private citizen. This was not a public event, nor did it relate to a public figure, Respondents’ attempt to make it such was to no avail. Mr.

Keatley does not contend that Respondents defamed his fallen son. That would require an entirely different legal conclusion. He brings this suit, because Respondents interfered in his private grief with their “loose and hyperbolic” language in such a way as to be highly offensive to a reasonable person.

CONCLUSION

For the foregoing reasons, the Petitioner requests this Honorable Court to hold that (1) *Hustler v. Falwell*’s actual malice standard does not apply to an IIED action brought by a private plaintiff; and (2) a state can use the tort of intrusion upon seclusion to protect its private citizens from offensive speech, even if that speech is loose or hyperbolic.

Respectfully Submitted, 123